Supreme Court, U.S.
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No. 97-47

In The

Supreme Court of the United States

October Term, 1996

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

vs.

PFIZER INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PLAINTIFFS' CLASS, BOWLING, *et al.*

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QUESTIONS PRESENTED

1. Whether petitioners may petition a third time for review of the December 21, 1993 decision of the Court of Appeals for the Sixth Circuit that petitioners, as unnamed class members who neglected to intervene, have no standing to challenge the judgment approving the *Bowling* class action settlement, when the issue was not before the Court of Appeals for the Sixth Circuit in the current appeals?

2. Whether the district court properly exercised its discretion in establishing a protocol pursuant to Fed. R. Civ. P. 54(d)(2)(A), (B), (C) and (D) for hearing pending applications by attorneys for awards of attorneys' fees and expenses from a class action common fund?

3. Whether the district court properly exercised its discretion in denying the application of petitioners-attorneys Sidkoff, Pincus & Green, P.C. and Wapner, Newman & Wigrizer, for an award of attorneys' fees and expenses from a class action common fund upon the basis that petitioners did not contribute any financial benefit to the plaintiff class through their activities in the *Bowling* litigation?

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STATEMENT OF THE CASE

Bowling, et al. v. Pfizer Inc., et al., the litigation from which the instant petition arises, is a product liability class action which was brought on April 19, 1991 by living recipients implanted with the Bjork-Shiley Convexo/Concave Heart Valve and their spouses. The Convexo/Concave Heart Valve was manufactured by defendant Shiley Incorporated, a wholly-owned subsidiary of defendant Pfizer Inc. Plaintiffs' class alleges that the Convexo/Concave Heart Valve is inherently defective in that the product has a propensity to fracture. Plaintiffs' class included approximately fifty thousand (50,000) valve recipients residing world-wide.

A settlement of the case was reached in 1992 and the order of the district court approving settlement is final. *Ridgeway v. Pfizer Inc.*, 115 S. Ct. 294 (1994). The settlement is currently being implemented and more than One Hundred Million Dollars has already been distributed to and for the benefit of claimant class members.

Petitioners are neither named parties nor intervenors to the *Bowling* litigation, but merely two valve recipients and one spouse who are class members, and their private counsel. To date, petitioners have filed seven appeals before the Court of Appeals for the Sixth Circuit and three petitions for certiorari before the United States Supreme Court. All prior appeals have been dismissed or denied and the two prior petitions for certiorari have been denied.

Petitioners filed their own state court class action, *Taylor v. Shiley*, in February 1986, on behalf of Convexo/Concave Heart Valve recipients residing in Pennsylvania, only, with large (but not small) valves, who did not have pending lawsuits. (R. 143, Ex. D: Second Amended Complaint In *Taylor v. Shiley*, at p.

34).[1] In September, 1989, more than three years after initial filing of their Pennsylvania lawsuit, petitioners first moved for class certification. Their motion for certification remained pending before the state court for eight years until summary judgment in favor of defendant was granted on the grounds of res judicata on July 3, 1997. No class was ever certified in the state court action. No class counsel were appointed in the action and no communication with members of that putative class ever was undertaken or ordered by the state court. No class settlement was negotiated in *Taylor v. Shiley*.

On January 23, 1992, the *Bowling* case was conditionally certified as a Rule 23(b)(3) opt-out class action by the district court. (R. 48: Order Certifying The Conditional Settlement Class And Scheduling A Fairness Hearing). Class counsel and counsel for defendants entered into a proposed settlement agreement. Subsequent to the issuance of appropriate notice to the class, the proposed settlement agreement was the subject of extensive fairness hearings before the district court on June 5, 8, 9, 1992 and July 22, 1992. In accordance with the notice provided the class, any class member who wished to participate during the hearings was permitted to do so. The court also permitted non-class members claiming an interest in the outcome to participate, including the representatives of consumer groups. As indicated by the transcripts of proceedings (R. 202: Transcript of 6/5/92 Fairness Hearing; R. 207: Transcript of 6/8/92 Fairness Hearing; R. 208: Transcript of 6/9/92 Fairness Hearing; R. 224: Transcript of 6/9/92 Fairness Hearing; and R. 251: Transcript of 7/22/92 Fairness Hearing), the district court heard from more than forty different American and foreign counsel and individuals, as well as considering written communications to the court by class members who could not be present. A substantial evidentiary record was created. Petitioners statement to the contrary is false. No person who desired to be heard was refused.

1. Citations to the record are to the district court docket numbers.

Petitioners received class notice of the *Bowling* settlement in February, 1992, and the complete text of the proposed agreement was available for their inspection. On February 26, 1992, less than one month after the proposed settlement had been reached, petitioners provided the state court with a status report wherein petitioners advised the state court of the *Bowling* proposed settlement and indicated that petitioners were meeting with defendants regarding the terms of the settlement. Moreover, the district court granted petitioners' request for written discovery of the terms of the settlement from class counsel and defendants prior to the fairness hearings.

Petitioners were given three opportunities to opt-out of the *Bowling* settlement. Yet, petitioners each time affirmatively elected to remain within the *Bowling* settlement class. (R. 224: Transcript of 6/9/92 Fairness Hearing, at pp. 92-95; R. 251: Transcript of 7/22/92 Fairness Hearing, at p. 83).

On August 19, 1992, the district court issued a sixty-eight page Order Finding The Proposed Settlement To Be Fair. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992). On September 10, 1992, the district court entered its Judgment Certifying The Settlement Class And Approving The Class Settlement. (R. 255: Judgment Certifying The Settlement Class And Approving The Class Settlement).

On September 17, 1992, petitioners filed their notice of appeal to the Court of Appeals for the Sixth Circuit. (R. 258: Notice Of Appeal). Petitioners were the only class members to appeal the district court's rulings. Petitioners did not seek to intervene prior to filing a notice of appeal.

On September 25, 1992, petitioners filed a belated motion to intervene in the district court, despite the fact that their filing of a notice of appeal had already divested the district court of

jurisdiction. By memorandum decision dated November 9, 1992, the district court determined that it could not decide the motion to intervene because of lack of jurisdiction. Petitioners appealed from the district court's memorandum decision also.

On March 2, 1993, while petitioners' appeal was pending, petitioners filed a motion under Fed. R. Civ. P. 60(b) requesting the district court reconsider its approval of the class settlement. (Pet. App. at 156). By Order dated March 26, 1993, the district court concluded there was no basis to request a remand from the Court of Appeals for a multitude of reasons including that matters raised in the motion were already considered by the court in approving the settlement; many of the allegedly "newly discovered" matters were actually known by petitioners, or with reasonable diligence could have been discovered at the time of the fairness hearing, or were actually discussed at the fairness hearing; much of the "newly discovered evidence" consisted of newspaper articles. (R. 335: Order). Petitioners appealed. (R. 337: Notice Of Appeal). On June 9, 1993, the Sixth Circuit dismissed the appeal because the District Court's order declining to request a remand from the Court of Appeals was not an appealable order.

On December 21, 1993, the Sixth Circuit issued two Orders. The first Order affirmed the district court's determination that it lacked jurisdiction to rule on the motion to intervene while petitioners' appeal was pending. The second Order dismissed the principal appeal. Citing to *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987), *Croyden Associates v. Alleco*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993), and *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988), the Court of Appeals held that because the petitioners "are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." (Pet. App. at 299). Petitioners then petitioned for rehearing *en*

banc, relying upon *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942) and an alleged inconsistency between *Cohen* and the more recent unpublished decisions of the Sixth Circuit. Respondents were asked to file a response, addressing these specific allegations, and did so.

On March 4, 1994, the Court of Appeals denied the petition for rehearing *en banc*, noting that the petition had been circulated among all active judges of the Sixth Circuit, and that "no judge . . . requested a vote on the suggestion for rehearing en banc." The Court further stated that the original hearing panel had "further reviewed the petition for rehearing and [had] conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." Petitioners then filed a petition for writ of certiorari with this Court, presenting the question of whether unnamed, nonintervening class members have standing to appeal from a judgment approving a class settlement. The petition was denied on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 294 (1994). Upon denial of the petition, the judgment approving the class settlement became final, and the district court instituted implementation of the settlement agreement.

Prior to the filing of the aforementioned petition and during the time period the district court regained jurisdiction, the district court ruled upon petitioners' pending motions. On April 5, 1994, the court denied petitioners' motion to intervene "because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class." (R. 363: Order Denying Motion To Intervene). Petitioners did not appeal from the order denying intervention. Instead, on April 13, 1994, they filed a motion in the district court under Fed. R. Civ. P. 59(e) for reconsideration of the denial of their motion to intervene. (R. 371: Motion By Class Objectors Ridgeway And Grunsby

For Order To Alter/Amend Order Dated 4/5/94 And Allowing Movant To Intervene).

On April 12, 1994, the district court denied petitioners' Rule 60(b) motion stating, "This complex and far-reaching settlement agreement was approved after exhaustive consideration and after the Court conducted fairness hearings on June 5, 8 and 9, 1992 and July 22, 1992. We have now thoroughly reconsidered our decision approving this settlement and conclude that after careful review of the Objectors' motion, and further review of our 68 page Order approving the settlement, we hereby conclude that the interest of justice dictates that the Objectors' motion be, and is hereby, denied." (R. 368: Order Denying Motion Under Fed. R. Civ. P. 60(b). On May 3, 1994, petitioners filed a notice of appeal from that decision. On August 8, 1994, the Sixth Circuit dismissed the petitioners' appeal upon the basis that petitioners were nonparty class members who were denied intervenor status, who were already found by the Court of Appeals to lack standing to appeal the settlement, and who likewise lacked standing to appeal the denial of their Rule 60(b) motion whereby they sought once again "to vacate the very settlement as to which this court earlier concluded the appellants lacked standing to challenge". Petitioners' motion for remand was denied as moot. Petitioners then filed another petition for certiorari, which was denied on January 9, 1995. *Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 780 (1995).

On November 25, 1994, the district court denied petitioners' motion for reconsideration of the denial of their motion to intervene. (Pet. App. at 141). Petitioners filed another appeal therefrom. The district court's denial of reconsideration was affirmed by the Court of Appeals and while this ruling is one of the issues identified in the instant petition for certiorari, petitioners have not addressed the issue in their discussion of the reasons for granting the writ. Plaintiffs-respondents, therefore, have likewise not addressed the issue hereinafter.

In 1992, after approving the *Bowling* settlement, the district court indicated that applications for awards of attorneys' fees and expenses from the class action common fund should be filed with the court. In conjunction therewith, petitioners were afforded the opportunity to review all fee applications and supporting documentation and to submit adversarial responses. (Pet. App. at 141; R. 489: Civil Minutes; R. 514: Order Concerning Further Discovery). Petitioners were granted the right to conduct discovery with respect to fee issues and to participate before the district court when discovery issues were addressed and the scope of discovery was determined. (Pet. App. at 141; R. 489: Civil Minutes; R. 514: Order Concerning Further Discovery). Petitioners declined to actively participate except to file their own *pro forma* attorneys' fee application.

As a result of petitioners' numerous appeals, consideration of these applications was delayed until 1995.[2] A hearing on those applications deemed meritorious was set for September 14, 1995 before the Hon. John F. Nangle, sitting by designation of Chief Justice William H. Rehnquist. (Pet. App. at 7; Pet. App. at 137). The trial court, the Hon. S. Arthur Spiegel, requested the designation of Judge Nangle for this limited purpose and for specific tasks delineated in the Order of Transfer (Pet. App. at 135) filed August 3, 1995 and the supplemental clarification thereto filed September 1, 1995 (Pet. App. at 11). The designation was temporary; the trial court did not recuse itself; and the trial court did not request the participation of Judge Nangle for reasons of "conflict of interest" or a "personal relationship with class counsel". Petitioners' allegations to the contrary are completely misrepresentative of the reasons for the

2. Also, on July 6, 1995, the lower court granted intervenor status to three nonparty class members, Crane, *et al.*, on attorneys' fees and expense issues. *Amicus*, Public Citizen, had also been granted the right as early as 1992 to participate in fee and expenses issues. (R. 586: Order Granting Motion To Intervene On Renewed Motion Of Gary Crane, *et al.*).

trial court's actions. Prior to the hearing, four orders were issued dated August 14, 1995 (later rescinded), September 1, 1995 and September 5, 1995. Three of these orders were entered by Judge Nangle. One order was entered by Judge Spiegel. The orders established a hearing date and additional protocol for pending applications for awards of attorneys' fees and costs from the class action common fund, whereby petitioners were granted the right to file any further additional memoranda, exhibits or other evidence in support of their position(s) as to any pending fee applications and to participate in the development of factual stipulations in preparation for the fee hearing. (Pet. App. at 7). Petitioners ultimately declined to exercise any of these rights. Additionally, a variety of last minute motions, filed by petitioners after the discovery cut-off date and approximately two weeks prior to the scheduled hearing, were denied. The district court also determined which of the applications filed were meritorious and which applications would, or would not, be considered at the September 14, 1995 hearing. The applications filed by petitioner law firms were deemed not meritorious and were denied upon the basis that petitioner law firms did not contribute any financial benefit to the plaintiff class in their activities in the litigation. (Pet. App. at 11).

The public, adversarial hearing took place on September 14, 1995. Opposition to the fee applications of class counsel and special counsel was provided by intervenors Crane, *et al.* and *Amicus* Public Citizen. Thereafter, petitioners appealed all four orders of the district court. The decisions of the district court were affirmed by the Court of Appeals for the Sixth Circuit and these rulings also constitute issues presented in the instant petition for certiorari.

SUMMARY OF REASONS FOR DENYING THE WRIT

The question of petitioners' appellate standing presented by the petition was resolved by this Court in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988). In accordance therewith, petitioners have twice been found to be nonparty, nonintervening class members who lack standing to appeal the *Bowling* settlement. *Bowling v. Pfizer, Inc.*, Appeal No. 92-3973, December 21, 1993, *cert. denied, Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 294 (1994); *Bowling v. Pfizer, Inc.*, Appeal No. 94-3519, August 8, 1994, *cert. denied, Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 780 (1995).

The facts underlying this petition are so unique and particular to this matter that the case is not suitable for review by the Supreme Court, to wit: three nonparty, nonintervening petitioners are the sole class members seeking to overturn a class settlement approved five years ago, which is now final and in its third year of implementation and through which in excess of One Hundred Million Dollars has already been distributed to and for the benefit of claimant class members; it has already been determined, with finality, that petitioners lack standing to appeal the settlement; the settlement which petitioners seek to overturn is one in which petitioners affirmatively elected to participate after being given three opportunities to opt-out; petitioners had their own separate lawsuit (*Taylor v. Shiley*) pending against defendants in a Pennsylvania state court; the protocol and procedure established for the attorneys' fee hearing was developed in recognition of the facts and circumstances specific to this case; and the denial of petitioners' attorneys' fee application was based upon the district court's particular factual familiarity, developed over a four year time span, with petitioners' course of conduct and acknowledged purpose for participation.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT APPLIED PRINCIPLES OF APPELLATE PROCEDURE ESTABLISHED BY THIS COURT AND CONSISTENTLY FOLLOWED BY THE COURTS OF APPEAL.

Petitioners' argument regarding their standing to challenge the *Bowling* settlement is not properly before this Court. The issue was not the subject matter of the appeals before the Sixth Circuit from which the instant petition for writ of certiorari arises. Petitioners are merely using their latest round of appeals to bring the issue before this Court for the third time. Irrespective, the question of petitioners' standing to appeal the *Bowling* settlement has already been resolved by this Court in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988). Therein, the Court specifically and conclusively held that only individuals who are parties, or those who properly become parties, may appeal an adverse judgment. Citing to *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) (appeal from denial of class action certification), this Court also rejected the suggestion made by the Second Circuit that there could be exceptions to this rule, finding instead that a nonparty is to seek intervention for purposes of appeal.

Subsequent to *Marino*, every Court of Appeals presented with an appeal from a class action judgment brought by nonparty class members has ruled that such individuals do not have standing to appeal. *See Shults v. Champion International Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco*, 969 F.2d 675, 679 (8th

Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988).

Petitioners' argument that there is a "split" among the circuits as to the issue of a nonparty class member's standing to appeal a judgment approving a class settlement is unfounded and has been manufactured for purposes of this petition. In support of such an allegation, petitioners rely upon decisions rendered prior to *Marino*; cases having completely unrelated factual and/or procedural circumstances and which do not stand for the proposition asserted by petitioners; and shareholder derivative cases which have been deemed "inapposite" to class actions. *Gottlieb*, 11 F.3d at 1010-11 (10th Cir. 1993); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1308 (3rd Cir. 1993). Petitioners' statement that the Court of Appeals for the Second Circuit made a "call" in 1996 for Supreme Court resolution of the alleged "split" among the circuits in *State of N.Y. By Vacco v. Reebok Int'l Ltd.*, 96 F.3d 44 (2nd Cir. 1996) is grossly misrepresentative. The Second Circuit, upon determining the issue of standing in a *parens patriae* matter, noted only that there was a "dearth of authority on the issue of unnamed beneficiaries' appellate standing in *parens patriae* cases", requiring the attorneys involved to cite to the divergent rules applicable to class actions and derivative actions in support of their particular positions on the issue. *Id.* at pp. 47-48.

The requirement of intervention is fully supported by the language and underlying policies of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. In *Marino*, this Court relied upon the text of the Federal Rules of Appellate Procedure in holding that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." 484 U.S. at 304. As the Court stated, Fed. R. App. P. 3(c) specifically requires that the notice of appeal specify the

"party or parties" taking the appeal. *Id.* Further, it is well-recognized that class members who disagree with the course of a class action have adequate procedures available to them through which they can protect their interests. Procedures applicable include intervention and the right to opt-out of a case designated as a Rule 23(b)(3) class action.[3] Also, class actions would become unmanageable and non-productive if each member could individually decide to appeal, thereby defeating the very purpose of class action lawsuits. *See Croyden*, 969 F.2d 675; *Walker*, 858 F.2d 1071; *Guthrie*, 815 F.2d 626.

II.

THE UNIQUE AND UNUSUAL FACTS OF THIS CASE MAKE IT UNSUITABLE FOR REVIEW BY THIS COURT.

The facts underlying this petition are so unique and particular to this matter that the case is not suitable for review by the Supreme Court. No broader issue is presented. As discussed *supra*, three nonparty, nonintervening petitioners are the sole class members seeking to overturn a class settlement approved five years ago, which is now final and in its third year of implementation and through which in excess of One Hundred Million Dollars has been distributed to and for the benefit of claimant class members; it has already been determined, with

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3. The "opportunity to opt-out after knowing the terms of a proposed settlement is unusual in the class action context and serves to protect the interests of class members." *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977). Class members are in an advantageous position because "they [know] the terms of the settlement before having to decide whether to opt out." *Weinberger v. Kendrick*, 698 F.2d 61,72 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 175 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (in making an opt-out decision, settlement class members "can benefit from the specific knowledge of the amount of recovery they can expect from remaining in the class".).

finality, that petitioners lack standing to appeal the settlement; the settlement which petitioners seek to overturn is one in which petitioners affirmatively elected to participate after being given three opportunities to opt-out; and petitioners had their own separate lawsuit (*Taylor v. Shiley*) pending against defendants in a Pennsylvania state court. In addition thereto, and as discussed below, the protocol and procedure established for the attorneys' fee hearing was developed in recognition of the facts and circumstances specific to this case, and the denial of petitioners' attorneys' fee application was based upon the district court's particular factual familiarity, developed over a four year time span, with petitioners' course of conduct and acknowledged purpose for participation.

In the *Bowling* case, the district court properly exercised its discretion in establishing a protocol for determining awards of attorneys' fees and expenses from the class action common fund. The requirements of Fed. R. Civ. P. 54(d)(2)(A), (B), (C) and (D) which address the protocol for determining claims for awards of attorneys fees and expenses were followed.

Petitioners have attempted to create the false impression that the protocol established by the district court for the submission and hearing of attorney fee applications was established in large part only several weeks prior to the actual fee hearing, that petitioners were denied participation, and that an evidentiary hearing did not take place. To the contrary, the protocols and procedures adopted span a three year time period from 1992 through 1995; petitioners had the right of extensive participation; and a hearing with submissions of evidence where opposing interests were afforded the opportunity to be heard did take place. A description of these protocols and procedures follows.

At the close of the *Bowling* fairness hearings, on July 22,

1992, the lower court indicated that any counsel who wished to submit an application for an award of fees and expenses should do so and that any counsel who had entered an appearance in *Bowling* would be permitted to respond to any application filed. (R. 251: Transcript of 7/22/92 Fairness Hearing at pp. 152, 174). Thus, in October, 1992, the first motions requesting awards of fees and expenses were filed with the district court.

Concurrent with the filing of applications for awards of fees and expenses, the district court also permitted discovery of the attorneys who submitted applications for awards of fees and expenses. Accordingly, in 1992, the first discovery requests were made of class counsel and special counsel by *Amicus* Public Citizen. While petitioners did not serve class counsel or special counsel with original discovery requests, during November, 1992, petitioners served upon class counsel and special counsel notices of joinder in the interrogatories and document requests originally served by *Amicus* Public Citizen. In accordance therewith and despite the stay discussed below, class counsel and special counsel, at all times served petitioners with all discovery materials served upon Public Citizen.

After the filing of original fee applications and during initial discovery, all fee matters were stayed as a result of the appeals filed by petitioners. (R. 297: 11/9/92 Memorandum Decision).

On November 24, 1994, after denial of *certiorari* by the United States Supreme Court, the district court lifted the stay and ruled that discovery in regard to attorneys' fees could again take place. A June 1, 1995 discovery deadline was set and the district court further ruled that all motions in regard to attorney's fees were to be filed with the court by July 15, 1995. (Pet. App. at 141).

On July 6, 1995, the district court granted intervenor status

to nonparty class members Crane, *et al.* on attorneys' fees and expense issues to represent the adverse interests of the class. Intervenors were represented by counsel for *Amicus* Public Citizen who had, in 1992, previously been granted the right to participate in fee and expense issues and also represent the adverse interests of the class. (R. 586: Order Granting Motion To Intervene On Renewed Motion Of Gary Crane, *et al.*).

All named parties, intervening parties and *Amicus* Public Citizen complied with the above referenced orders and deadlines established by the district court. All discovery being concluded and all original fee applications with appropriate supplementation having been filed, the Hon. John F. Nangle held a brief status conference via telephone on August 4, 1995 with all parties, named and intervening, and the *Amicus*, wherein the court indicated that a fee hearing would be set and a protocol established.[4]

Thereafter, the district court issued an Order Setting Hearings On Applications For Attorneys' Fees (Pet. App. at 14). This Order was then rescinded and the Amended Order Setting Hearings On Applications For Attorneys' Fees And Costs was issued on September 5, 1995 (Pet. App. at 7). Hearing was set for September 14, 1995 on all applications for attorneys' fees and expenses which had been found preliminarily meritorious as having benefitted the plaintiffs' class. A protocol was also established for the hearing. One attorney was to speak on the behalf of each of the fee applications being considered. Additional objections or documentation were to be filed with the court, with supporting memoranda, no later than September 8, 1995. Any interested party was permitted to file exhibits or

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4. Petitioners have incorrectly alleged that this status conference was an *ex parte* telephone conversation. All parties and the *Amicus* were represented during the conference. Petitioners were not included in the conference inasmuch as they are not parties or intervenors, or *Amicus*.

other evidence in support of its position, and if the interested person or entity wished to file such, was to participate in a telephone conference or meeting with all other interested parties to produce an agreed upon list of exhibits, or where not agreed upon, a brief statement addressing such. All attorneys participating in the hearing were to produce a comprehensive stipulation covering all matters which could reasonably be stipulated, to be filed no later than September 11, 1995, in order to minimize the need to hear unnecessary and repetitive evidence at the hearing.

All named parties, intervening parties and *Amicus* Public Citizen complied with the foregoing protocol. Petitioners declined to participate in the process. The attorneys' fee hearing took place on September 14, 1995.

The record clearly indicates that petitioners' allegations of abuse of discretion are baseless; that it was petitioners who chose not to access the rights provided them by the district court.

In the Sixth Circuit, abuse of discretion is defined as "a definite and firm conviction that the trial court committed a clear error of judgment." *Monette v. AM-7-7 Baking Co.*, 929 F.2d 276, 280 (6th Cir. 1991) (quoting *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989). In the instant matter, the district court committed no error of judgment, let alone a clear error of judgment. The Advisory Committee Notes to Fed. R. Civ. P. 54(d)(2) clearly point out that with respect to issues involving the evaluation of legal services, evidentiary hearings are not required or mandatory[5]; the amount of time for the

5. Not only is it *not* mandatory that a hearing be evidentiary, or that actual testimony and cross-examination take place, a hearing itself is not required. *Building Serv. Local 47 Cleaning Con. v. Grandview*, 46 F.3d 1392, 1402 (6th Cir. 1995) (district court's failure to conduct an evidentiary hearing is not reversible error because a fee application may be decided without a hearing).

preparation of submissions both in support of and in opposition to awards should be tailored to the particular case; that the court may use case management techniques to limit the scope of fee disputes; and that the court is authorized to establish procedures to facilitate the efficient and fair resolution of fee claims. If petitioners suffered any prejudice as a result, it was due to their own doing and own inactivity.

The district court also properly exercised its discretion in denying petitioner-attorneys' request for an award of attorneys' fees and expenses from the class action common fund.

Petitioners first argue that the Hon. S. Arthur Spiegel lacked the jurisdiction and power to deny appellant law firms an award of attorneys' fees because the *Bowling* case had been transferred to the Hon. John F. Nangle. This is a misstatement. Judge Nangle was designated for service in the United States District Court for the Southern District of Ohio "to perform judicial duties . . . in the matter of *Bowling, et al. v. Pfizer, Inc., et al.*, No. C-1-91-256". (Pet. App. at 137). The judicial duties of Judge Nangle were limited to those delineated in the Order of Transfer (Pet. App. at 135) filed August 3, 1995 and the supplemental clarification thereto filed September 1, 1995 (Pet. App. at 11). The issues specifically transferred to Judge Nangle are defined and explicitly set forth in the September 1, 1995 Order (Pet. App. at 11). Nothing contained within the orders of transfer or the original designation for service restricted the trial court's right or power to deny petitioner law firms' applications for awards of fees and expenses. Furthermore, determination by Judge Spiegel of the issue of whether or not petitioners' fee application was meritorious was the more expedient procedure, for the trial court was inherently familiar with the facts surrounding petitioners' application. No error occurred when Judge Nangle assumed the responsibility of conducting the fee hearing and issuing decisions from such hearing, while Judge

Spiegel presided over all other pre-hearing and post-hearing matters. *United States v. Girolamo*, 23 F.3d 320 (10th Cir. 1994).

Petitioners Sidkoff, Pincus & Green, P.C. and Wapner, Newman & Wigrizer requested that the district court award them either $7,500,000 in attorneys' fees or 40% of any gross attorney fee awarded in the event a single award was made which was to be allocated among all counsel entitled to attorneys' fees. The law firm petitioners also requested reimbursement of their costs and expenses. Class counsel and special counsel opposed the requested award for good cause, and the district court denied petitioners' applications upon the basis that appellant law firms did not contribute any financial benefit to the plaintiff class in their activities in the litigation. (Pet. App. at 11). Petitioners appealed the denial. The standard of review for denial of a fee award is abuse of discretion. *Cramblit v. Fiske*, 33 F.3d 633 (6th Cir. 1994).

As is evidenced by the record, the involvement of the petitioner law firms was disruptive and unproductive to the *Bowling* case. Petitioners purposefully impeded the expeditious implementation of the approved settlement with no regard for the best interests of the class. The *Bowling* settlement was and is the only vehicle available to provide any benefits whatsoever for the majority of the world-wide *Bowling* class members. This was made very clear to all involved in the *Bowling* case during the fairness hearings and through the district court's order approving the settlement. Since 1992, the district court attempted numerous times to explain this fact to the petitioner law firms and to clarify for them the jeopardy in which the majority of the class members were placed by the course elected by the petitioners.

Petitioners alleged that, other than Public Citizen, they were the only objectors to the *Bowling* settlement who vigilantly

continued to promote the best interests of the class, and that they should be paid for such. In actuality, petitioner law firms requested that the district court pay them $7,500,000 for their services rendered in presenting continuous specious objections to the *Bowling* settlement and class certification, filing unending meritless appeals, and delaying distribution of settlement benefits for years. The record clearly indicates that all of the petitioners' actions were designed and intended to defeat and delay the *Bowling* settlement and class certification. Had they been successful, there would be no common fund to provide them compensation. Thus, the fee request of the petitioners was unjustifiable and unsupportable. *See Alpine Pharmacy, Inc. v. Chas Pfizer & Co., Inc.*, 481 F.2d 1045, 1054 (2nd Cir.), *cert. denied*, 94 S. Ct. 722 (1973). As the petitioner law firms did not contribute to the maintenance of the common fund, they are not entitled to an award of attorneys' fees and expenses. *Gottlieb v. Wiles*, 150 F.R.D. 174, 185 (D. Colo. 1993).[6]

Petitioners' history of objections to the settlement at the time of the fairness hearing is well-documented by the district court's order approving the proposed settlement and class certification. *Bowling*, 143 F.R.D. at pp. 151-167. Therein the district court addressed and refuted all objections raised by appellants. As the record indicates, petitioners did not state any well-placed objections which instigated or encouraged the settlement enhancements to which defendants agreed. To the contrary, as pointed out by the district court in its order dated

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6. Petitioners have cited to comments made by counsel for defendants and class counsel which were made in conjunction with the mediation of petitioners' first appeal, which was ordered by the Sixth Circuit, in support for their claim that they should be awarded fees as objectors. This mediation is still subject to confidentiality rules, so the reasons for these statements cannot be discussed in detail. However, it can be stated that the statements made were required to be made in conjunction with a negotiated resolution of the appeal which was ultimately unsuccessful.

November 27, 1994 (Pet. App. at 141), since their first involvement, the petitioner law firms have had a continuous misunderstanding of the details of the settlement. Petitioners have, unendingly, made absolutely unsubstantiated accusations of collusion, fraud, and bad faith not only against defendants' counsel and plaintiffs' counsel, but the district court as well. Since 1992, the lower court has repeatedly addressed each and every one of these, and has determined all to be mere "inflammatory accusations". (*Id.* at 150). The district court found the petitioners' claims of future problems with implementation of the settlement to be "wildly speculative predictions" (*Id.* at 148); that their claims of fraud and misrepresentation were meritless and based upon continued misunderstanding of the details of the settlement (*Id.* at 150); that there is "an absence of any real evidence" to support the allegations of collusion and fraud, which allegations the district court carefully studied, reviewed and considered at length prior to determining the settlement to be fair and reasonable (*Id.* at 151), *Bowling* 143 F.R.D. at p. 153 ("this Court has searched for, but not found any evidence that the parties engaged in collusion")[7]; and that the petitioners' allegations that the district court was deceived, are false (Pet. App. at 141, 152-153). Petitioners played no part in creating a single benefit for the *Bowling* class, or any portion of the class action common fund.

Petitioners allege that the *Bowling* settlement was patterned after a document petitioners prepared in their state court case in 1989. There is no merit to this allegation. A document prepared

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7. Additionally, on May 13, 1992, a full and lengthy hearing attended by petitioners addressing their issue of collusion was undertaken by the United States Magistrate. (R. 96: Civil Minutes of 5/13/92 Hearing). On May 14, 1992, the Magistrate found "no evidence from any source indicating that the settlement may be collusive". (R. 97: Transcript of 5/14/92 Hearing, at p. 3). The ruling of the Magistrate was affirmed by the District Court. (R. 122: Civil Minutes of 5/19/92 Hearing, at p.67).

by petitioners and presented to the district court bears no resemblance to the *Bowling* settlement agreement. As pointed out by the district court, if one were to assume this allegation to be true and the settlement was "stolen" from the petitioners, how can the petitioners then continue to assert that the settlement is unfair and unreasonable? *Bowling*, 143 F.R.D. at p. 152. Likewise, if the settlement was designed by petitioners, how can their continued misunderstanding of the details of the settlement (as pointed out by the district court at Pet. App. 141) be explained?

The district court did not abuse its discretion in denying petitioner law firms an award of attorneys' fees and expenses.

Last, petitioners make the extremely generalized statement that the Court's recent decision in *Amchem Products, Inc. v. Windsor*, __ U.S. __, 1997, 1997 U.S. Lexis 4032, No. 96-270 (6/25/97) supports petitioners' allegations that the district court improperly certified the *Bowling* class and improperly approved the *Bowling* settlement. Petitioners reliance upon *Amchem* is misplaced. *Amchem* affirmed the decision of the Court of Appeals for the Third Circuit which, in turn, had cited with approval to the *Bowling* case in its opinion at 83 F.3d 610, 631 (3rd Cir. 1996).

CONCLUSION

It is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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